Legalism, Realism and Supreme Court Decision-making

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Political scientists have long debated the relationship between questions of fact and questions of value. Among the leading questions considered in this debate been: Can our political and moral beliefs be subject to empirical testing or are the grounds for our values entirely independent of the way the world is? Does empirical research in political science have implications for the content of our political and moral ideals? Or does this research speak only to the possibility of realizing these ideals? Is objective research possible in political science? Or is political science necessarily ideological in nature? These are interesting and fascinating questions. Yet our answers to these questions have little impact on the conduct of empirical research. The first two pairs of questions are more important to the political theorist than to the empirical political scientist. Whether our values are connected to or independent of the conclusions of empirical political scientists is certainly relevant to political theorists interested in justifying one set of political and moral beliefs or another. But whatever answer we give to these questions presupposes that rational and objective knowledge is possible in political science. The last pair of questions does raise an important question for those engaging in empirical research precisely because one of the questions denies the possibility of rational and object knowledge in our discipline. But that denial is simply not credible. Many political scientists choose research projects that are connected to their political and moral concerns. And occasionally a political scientist may neglect certain evidence that calls his values into question. But there is simply too much accumulated evidence of the possibility of objective and rational analysis to call our whole discipline into question. There are two many political scientists who have shown that it is possible for us to put aside our own ideals and follow the evidence where it leads.

The traditional debate over facts and values, then, is not all that relevant to the concerns of the working political scientist. There is, however, another way in which facts and values can become intertwined. Political scientists study many phenomena that is, in important ways, inherently normative. We examine, for example, the motives of members of both the elite and the masses. In identifying the ideals that may or may not motivate people, we cannot help but talk about values and philosophies. Even research that denies the hypothesis that values and ideals are important in political life needs some conception of what a political value or ideal is, if only to adequately test the hypothesis. Political scientists also study institutions and practices that are intrinsically normative in nature. A study of the way in which members of Congress represent or do not represent the views of their constituents is impossible if we do not have some definition of representation. Yet, as Hannah Pitkin's lengthy work on the subject shows, representation is not only a normative concept it is anything but a simple normative concept.

The central argument of this paper is that in the study of judicial behavioral empirical issues are sometimes intertwined with moral and jurisprudential issues. We often cannot answer empirical questions about why judges do what they do without first answering jurisprudential questions about the status and nature of legal argument. Our view of empirical matters will, in these cases, depend in large part on our view of moral or legal questions. This is emphatically not to say that research on these issues is necessarily biased or otherwise suspect. It may, after all, be possible to have some reasonable grounds for the jurisprudential views we adopt in our empirical research. Moreover—and this is a subsidiary claim of this paper—we might have good grounds to choose one or another jurisprudential

view precisely because it is more likely to enable us to conduct empirical research that is fair, unbiased, and fundamentally responsive to the evidence before us, not our own moral or legal predilections.

Rather than survey the role of normative questions in the discipline of political science as a whole, we will examine one field in depth, the study of Supreme Court decision-making. Political scientists ask two questions about Supreme Court decision-making: How *should* justices decide and how *do* justices decide? Some scholars focus on the first, jurisprudential, question and discuss such issues as the nature of legal reasoning and the justices' responsibility to the law. Other scholars focus on the second, behavioral, question, and discuss such issues as what variables actually influence the decisions of justices. It is commonly thought that the answer to the second, behavioral, question is entirely independent of the answer to the first, jurisprudential, question. The first claim of this paper is that while the two questions are partly independent, they are not wholly so. We suggest that a jurisprudential understanding of the process of Supreme Court decision-making plays a role in evaluating the empirical evidence about the behavioral question of how justices actually decide cases. The second claim of this paper is that, on the basis of the jurisprudential theory we find most plausible, the evidence in support of the behavioral argument that Supreme Court justices decide on the basis of legal precedent and principle is stronger than has previously been thought. We will present some evidence supportive of this behavioral argument that has been overlooked and argue that the import of this evidence is clearer in light of the jurisprudential stance we take. But it is *emphatically* not our claim that the case for the importance of legal precedent and principle has been made. We *do not want* to claim that the jurisprudential view we favor leads to any particular behavioral conclusions. For our third and most important claim is that we are most likely to be able to conduct this empirical research in a fair and unbiased manner if adopt our favored jurisprudential theory. Much more research needs to be done before we can reach any firm conclusions on the empirical question of whether legal principles influence the decisions of judges. That research is most likely to help settle the behavioral debate if it adopts the jurisprudential view we find most plausible.

One last prefatory note: We freely acknowledge that we have chosen to study this field precisely because it is so likely to support our larger conclusions. After all, the legalism-realism debate has been going on a long time. There are other sub-fields in political science where normative and empirical matters are less likely to become intertwined. That we choose this sub-field to study should not, however, be taken to be a result of our own biases. It is not our claim that normative and empirical matters are *always* intertwined in the way we describe. That claim is far too strong. Rather, our view is that normative and empirical matters can be intertwined in interesting and important ways that have not always been clearly seen. If we can find see such a relationship between fact and value in this case political scientists (and other social scientists) will find it easier to see such relationships where they are not so clear cut. While we do think that this paper contributes something new to the old debate about how the justices make their decisions, the greater importance of this paper is that it can help us see an important way in which normative and empirical matters become enmeshed.

1. THE BEHAVIORAL DISPUTE ABOUT JUDICIAL DECISION-MAKING

Two broad answers can be given to the question: Why do the justices on the United States Supreme Court vote the way they do? We will call the first answer to this question "legalism." The legalist holds that Supreme Court justices decide on the basis of legal principles and precedents. Legalists emphasize the influence of Constitutional and statutory principles and the previous decisions of the Court on the behavior of Supreme Court justices. Though many students of judicial behavior

reject legalism, there are some notable exceptions. A number of judicial behavior scholars, including Gibson (1983, 1991), Goldman and Jahnige (1985), Johnson (1985), and George and Epstein (1992) argue that both legal and extra-legal variables determine the votes of Supreme Court justices.

Legalists believe that the rule of stare decisis has a role in the decision-making of Supreme Court justices. It is useful to distinguish between two kinds of stare decisis, however. When a justice in case 2 votes for an outcome similar to that he voted for in case 1 and does so because he was influenced by the rule of law he supported in case 1, he is following personal stare decisis. When a justice in case 2 votes for an outcome similar to that voted for by the majority on the Court in case 1, was influenced by the rule of law announced in the majority opinion, but was either not a member of the court in case 1 or was a member, but dissented or did not participate in that case, he is following traditional stare decisis.[1]

Legalism is not be exhausted by the claim that either or both kinds of stare decisis play a role in determining the decisions of justices. For legalism holds that legal reasoning itself is central to judicial decision-making of all kinds. A legalist might argue that while such reasoning draws upon standing principles and precedents, it can lead a justice to overturn some previous precedents or to enunciate new legal principles. Behavioral legalism, then, would hold that, whether previous precedents are upheld, rejected, or modified, the central factor influencing judicial decision-making is the legal reasoning of the justices. That behavioral legalism includes the possibility that legal reasoning can lead judges to overturn precedents is controversial and we will return to it below. At this point, we merely want to point out to the reader the potentially broad scope of legalist claims.

We will call the second answer to our initial question, "behavioral realism." This view, which Segal and Cover (1989) have called "the fundamental assumption about the behavior of Supreme Court justices" maintains that justices vote on the basis of their own moral or policy views rather than on the basic of legal principle and precedent.

We call this position "realism" because it is influenced by the jurisprudential ideas of the American legal realists of the 1920s and 1930s. The legal realists, as Schubert (1964) tells us, were a "heterogeneous lot." The "only common value they shared was their rejection" of legal formalism. Nevertheless, the tendency of legal realism is to hold that legal reasoning based upon principle and precedent cannot constrain the decision-making of judges. Jurisprudential legal realists argue that "legal rules and principles cited by judges, particularly appellate court judges, as a basis for their decisions are largely a smoke screen for the furtherance of their views on social and economic policy...this occurs because inherent in judicial decision making is a large amount of discretion in choosing which precedents or principles to follow (Goldman and Sarat, 1989)." We are not claiming that all behavioral realists are also jurisprudential realists. For the behavioral and jurisprudential claims are distinct. One could, after all, be a behavioral realist and yet bemoan the fact that justices follow their own policy views rather than legal principle. We will argue, however, that jurisprudential realism does provide some support for behavioral realism. Indeed, it is not hard to see that one or another kind of jurisprudential realism is part of the case for behavioral realism. For this is what many behavioral realists tell us. Because we will challenge the behavioral realist approach in this article, it is useful to allow its advocates to present their views in their own words.

In the recent article we have already quoted from, Segal and Cover defend the realist model and offer this view regarding the role of law in Supreme Court decision-making:

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[1] These two definitions were composed by us. The term "personal stare decisis" was first suggested by Reed Lawlor (1963).

> Traditional modes of analyzing judicial decisions emphasize the importance of legal doctrine and precedent. This is not the place for a complete defense of legal realism, but we do briefly note the following. Supreme Court justices are not bound by the legal doctrines accepted by the Court majority; they are free to use whatever doctrines fit their own preferences. Precedents are typically found on both sides of any case reaching the Supreme Court; and even if the precedents weigh heavily on one side, justices are free to distinguish or overrule them. While precedent might have some value for some justices, the empirical evidence on the importance of precedent consists of little more than Schubert's (1963) exposition of the votes of Justice Clark in courts martial of civilian personnel and dependents. Evidence on the Court establishes that judicial restraint is little more than a 'cloak for the justices' policy preferences' (1989, p. 562).

Harold Spaeth espouses a similar view:

> Some behavioralists are rule skeptics. These people argue that judges can always manipulate the law to produce the outcome they desire, and that this is especially true at the Supreme Court level for...the Court does not review 'easy' cases (1990, p, 192).[2]

Roger Handberg has made a similar argument:

> Judicial restraint [which includes respect for precedent is]...a rhetorical fig leaf used to disguise the judges' policy preferences but in itself has no independent force upon their decisions (1991).

Glendon Schubert has stated that judicial behavioralists "have debunked legal principles as factors controlling decisions (1963)."

Note that while Schubert's claim is, on its face, purely behavioral, the arguments of Segal and Cover, Spaeth, and Handberg, mix behavioral with jurisprudential claims. They argue, in essence, that because legal principle and precedent cannot set limits on the decisions of Supreme Court justices, we must look to other factors, such as policy and moral preferences to explain the decisions of Supreme Court justices. In other words, these authors hold that because jurisprudential legal realism is true, behavioral legalism cannot be true.[3]

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[2] The language quoted above does not suggest that Spaeth is talking about himself. But in light of his recent book with Segal there can be little doubt that this is Spaeth's view (Segal and Spaeth, 1993)..

[3] We should point out here that for behavioral realists, there are other factors, besides the policy and moral attitudes of judges which effect judicial decisionmaking. These factors may include public opinion, small group variables, the relationships between members of the Court and the other branches of government, and the status of litigants and attorneys who appear before the Court. We accept that these other extra-legal factors are often important determinants of the voting of justices. Our paper is primarily concerned with how to evaluate evidence which is ambiguous between the legalist and realist views. That is why, in the rest of this work, we will not consider the other factors to which behavioral realists point. We most certainly do not claim that legal reasoning on the basis of principle or precedent is the sole or even the most important basis of judicial decisionmaking. And our partial critique of realism is not meant to downplay the importance of these other factors which have been shown by students of judicial behavior to influence justices.

This connection between jurisprudential legal realism and behavioral legal realism is even more emphatically demonstrated in a book by Segal and Spaeth that is dedicated to studying the question of judicial decision-making in an empirical manner (1993). Yet in a subtle, important and lengthy work, Segal and Spaeth do not offer a single, new, empirical argument to refute the claims of behavioral legalism. Rather, most of one chapter of their book offers arguments drawn from the philosophy of law against jurisprudential legalism. For their claim is that because jurisprudential legalism is false, behavioral legalism "has not and, in all probability cannot" be empirically tested. Once again, the case against behavioral legalism is directly tied to the case against jurisprudential realism.

Our claim, then, is that a central part of the argument for behavioral realism is the acceptance of jurisprudential realism. We recognize that this claim is quite controversial, despite the support this claim has received from the behavioral realists we have just cited. We will return to the relationship between jurisprudential and behavioral realism in a moment. To set the stage for our argument, however, we want to first make a few remarks about alternatives to jurisprudential realism and then take a closer look at the role of empirical evidence in the behavioral dispute about judicial decision-making.

2. THE JURISPRUDENTIAL DISPUTE

Jurisprudential legal realism was developed in revolt against legal formalism. There were many varieties of formalism and we will not attempt to survey them here.[4] Most formalists claimed that legal reasoning is akin to a science. Like any other science, formalists claimed that legal reasoning has a method of its own. The formalists held that, when applied properly, this method would lead any justice to the same conclusion in a particular case.[5] It was their confidence in the existence of such a method that lead formalists to hope that legal reasoning could provide objective decisions that would not be influenced by the particular policy or moral aims of justices.

The power of jurisprudential legal realism comes, in large part, from its pointing to the emperor's new clothes in which legal formalism garbs itself. By the 1920s many legal theorists came to doubt that there was any method of legal reasoning that would always or usually lead all justices to the same conclusion in adjudicating a particular case. The continued disagreements among justices were, by itself, fairly conclusive evidence that the hopes of the formalists were forlorn. It was quite clear to the legalist realists, and to most anyone who had read their critique of formalism, that ideological, moral, and policy disputes could not but influence justices. Since one or another variety of formalism was the only plausible account of legal reasoning going, it was not difficult to conclude, with the jurisprudential realists, that legal principles, precedents and arguments cannot really constrain the decisions of justices.

While formalism and realism have dominated jurisprudential debates throughout most of this century, in recent years, a new, more flexible, understanding of the nature of legal reasoning has been advanced. We cannot here provide a full account of this doctrine which, following Ronald Dworkin, we call interpretavism. But we will sketch some of the leading ideas of this view below.

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[4] One, and perhaps the most common version of formalism is the "plain meaning" approach. For an excellent critique of this view, see Segal and Spaeth (1993*), The Supreme Court and the attitudinal model,* pp. 34-38.

[5] At least in so far as there was law relevant to the case. Formalists admit that there might be circumstances in which a judge has no law by which to decide.

3. EMPIRICAL EVIDENCE AND THE BEHAVIORAL DISPUTE

The dispute between behavioral realism and behavioral legalism is by no means one which rests on empirical considerations alone. Consider for a moment the case of *Johnson v. Virgini* (373 U.S. 61 (1963)). This case involved a black defendant who was held in contempt for refusal to move to a section in the court room designated for blacks. The Supreme Court, in a one page unanimous per curiam opinion, reversed the decision of the lower court. In doing so, the Court cited *Brown vs Board of Education* and two other cases and stated that "such a conviction cannot stand for it is no longer open to question that a state may not constitutionally require segregation of public facilities." It might seem reasonable to take the legalist stance and conclude that the Court's decision in this case was influenced by its decision in *Brown* and the other two cases it cited. However, the realist could contend that the justices in *Johnson v. Virginia* were not influenced by *Brown,* but were merely voting their opposition to racial segregation. The evidence, or at least all the evidence we have considered so far, can not, by itself, settle the dispute between behavioral legalism and behavioral realism. The same could be said, we would argue, for some of the most sophisticated studies of the decision-making of Supreme Court justices.

Consider a study of judicial behavior that constructs a Guttman scale from the votes of Supreme Court justices on a series of related cases over a ten year period.[6] Let us also suppose that the votes on these cases turn out to highly related and that the individual justices can be assigned scores on this scale. Typically, a political scientist will claim to have discovered that the votes of the justices on this issue dimension can be satisfactorily explained by their underlying policy attitudes. Success in such explanation will be taken to show that it is these underlying policy attitudes *rather* than the commitment of these justices to certain understandings of legal precedent and tradition which determine how they vote. Thus, for example, after presenting scale data of this kind, Lawrence Baum concludes that the "justice's policy preferences [are] largely responsible for [the] differences in the decisional behavior (1989)."

Now let us further suppose that, in this body of cases, the individual justices (or groupings of justices taking similar positions on the scale) tend to justify their votes in similar ways. That is, they present similar argument based on some legal principles and precedents. Although they do not often investigate such questions, most scholars of judicial behavior would not be surprised by this result. They would argue that the legal arguments given by the justices are an ideological justification for the votes taken rather than a determinant of those votes. Note, however, that an alternative explanation of this empirical result is ready at hand. We could claim that what has been shown by the scale study is that votes on these issues are determined by the justices' understanding of legal precedent and principle.[7]

It seems, then, that the evidence adduced by this kind of behavioral research, by itself, could be entirely compatible with either the legalist or the realist hypotheses. Yet, in most studies of this sort, the student of judicial behavior will claim that his or her work supports the realist hypothesis. And he will do so without any exploration of the pattern of legal argument contained in the opinions of the justices. Why is the realist explanation preferred? We believe that the preference for realist explanations arises in part because of the stark opposition between jurisprudential realism and

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[6] Consider, for example, Harold Spaeth's construction of narrow-based Guttman scales of the votes of Supreme Court Justices from the 1958 term to 1973 (Rhode and Spaeth, 1976). .

[7] Recall that we have supposed that a study of the legal doctrines invoked in these decisions by different justices would show some consistent pattern of reasoning.

jurisprudential formalism and the penchant of behavioral realists to accept some version of the former view while behavioral legalists accept the latter. On the one hand, those who accept behavioral realism do so in part because they implicitly accept jurisprudential realism and a reductionist model of social scientific explanation. This leads behavioral realists to think that realist explanations are always to be preferred over legalist explanations and thus to assume that ambiguous evidence is supportive of behavioral realism. On the other hand, even those scholars who accept behavioral legalism understate the evidence for this view because they implicitly accept jurisprudential formalism.

In the next two sections of the paper (4 and 5), we consider in more detail the two reasons that incline scholars to think that behavioral explanations are more plausible or more acceptable than legal explanations. We will argue first, that judicial scholars accept a general presumption in favor of reductive explanations in the social sciences and second, that they assume that jurisprudential realism is true and thus that behavioral realism must be true. In the course of sections 4 and 5, we try to undermine these two reasons for preferring behavioral realism over behavioral legalism. Then, in sections 6 and 7, we will consider some empirical evidence which, in light of our theoretical arguments, can be seen to support behavioral legalism. In section 8 we will argue that those who defend behavioral realism sometimes rely on an overly narrow understanding of legal reasoning. This leads them to underestimate the evidence for behavioral legalism.

4. REALISM AND REDUCTIONISM

To understand why behavioral realist explanations seem to be simpler or more plausible than behavioral legalist explanations, we need to turn to a brief consideration of the intellectual sources of realism in both its behavioral and jurisprudential forms. Underlying both jurisprudential and behavioral realism is the reductionist temper in modern political and social thought. The nature of this inclination to reductionism is best seen by briefly looking back to two of our intellectual ancestors, Machiavelli and Hobbes. For it is Machiavelli and Hobbes who brought a realistic and debunking spirit to the study of politics and society.

Machiavelli taught us to be suspicious of the ideological claims of politicians. Indeed, the pejorative notion the term ideology often has is the product of Machiavelli's recognition that:

> the princes who have done great things are those who have taken little account of faith and have known how to get around men's brains with their astuteness;..
>
> Everyone sees how you appear, few touch what you are (1985, ch. 8).

Machiavelli teaches that ideals may motivate the people. But for princes and potential princes–in our terms, the political elite–they are simply a convenient cover under which to pursue one's own self-interest. Machiavelli thus bids us to look beneath the ideological garb in which politicians cloak their self-interested designs. We will call this intellectual stance a reductionism about motives.

Hobbes generalized Machiavelli's reductionism about motives and provided a philosophical base for it. He also added a second reductionism, which we will call a reductionism about moral and legal reasoning. Hobbes tried to show that what we had thought was moral reasoning reduces in essence to instrumental reasoning. Our preferences for one state of politics or society or another cannot be justified in moral terms. Rather, they simply reflect our view of what will best satisfy our desires.

And thus Hobbes claims that "tyranny and oligarchy...are not names of other Formes of Government but of the same Formes misliked; (1968, p. 240)." that "these word of Good, Evill, and Contemptible, are ever used with relation to the person that useth them: There being nothing simply and absolutely so; (p. 120), and that "Where there is no common Power, there is no Law: where no Law, no Injustice (p. 188)."

So what many contemporary political scientists have inherited from Machiavelli and Hobbes is a distrust of the theological, moral, and legal claims made by politicians of all sorts. When faced with these claims, we are tempted to make two reductionist responses. From both Hobbes and Machiavelli, we have learned to be suspicious of politicians who claim to be motivated by theological, moral, or legal considerations. When such claims are offered, we look for the interests which underlie them. This is reductionism about motives. And we have learned to question whether the theological, moral, or legal reasoning is at all possible. This is reductionism about moral and legal reasoning.

These two reductionisms are quite common in contemporary social science. Yet in most fields, they are by no means the only accepted approach. Although some political and social scientists are reductionists about either motives or moral and legal reasoning, and others are reductionists about both, still others reject both forms of reductionism. We want to argue that whether one should be a reductionist or not in explaining some particular phenomena is largely an empirical matter. However, legal realists of both the jurisprudential and behavioral variety are often not willing to leave it at that. They are inclined to think that reductionist explanations are prima facie preferable to non-reductionist explanations.[8] Thus, it is not surprising that scholars of judicial behavior cast doubt on explanations which cite the legal reasoning of Supreme Court justices. Nor is it surprising that evidence that is inherently ambiguous is usually taken to support behavioral realism.

Rather than directly confront the philosophical issues about reductionism, we want to argue that neither behavioral nor jurisprudential legal realism is consistently reductionist at all. Once we see how and where legal realism departs from the reductionist paradigm, we think that it will be fairly plain to see that there is no justification for a presumption in favor of reductionist explanations.

Legal realism, in both its jurisprudential and behavioral strains, seems to follow directly from the reductionist spirit of Hobbes and Machiavelli. It tells us to look beneath the veil of legal disputes which cannot be rationally settled and discover the real interests and preferences which determine the decisions of justices. Note, however, that in one crucial respect, the legal realists shrink from the radical conclusions of their great ancestors. Hobbes and Machiavelli insisted that not only were the ideological presentations of politicians a sham, but that they were always a cover for self-interested actions. Legal realists do not go so far. Although they wish to uncover the pretensions of legal reasoning, realists do not claim that justices always act in a self-interested way. Rather, they argue that justices are following their own policy or moral preferences. Thus legal realists are reductionists about legal reasoning but not necessarily about moral reasoning.[9] And they generally reject reductionism

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[8] It is, of course, difficult to generalize about the commitments of a set of scholars to reductionist over non-reductionist explanations. It is especially difficult because these commitments are often implicit rather than explicit in their work. We recognize that it would be useful to our case if there were more empirical evidence about the influence of what we have called the reductionist paradigm in contemporary political science and, more specifically, among students of judicial behavior. But to accumulate and present such evidence would require another paper. Moreover, we think that the presumption in favor of reductionism is fairly evident in a wide range, though certainly not all, scholars of judicial behavior.

[9] As a matter of fact, many of the legal realists were reductionists about moral reasoning as well. Indeed the argument of the jurisprudential legal realists is fully satisfactory only if it can be shown that public policy and moral judgments as well as legal judgments are arational in nature. That is to say that a consistent jurisprudential legal realist should be an emotivist or non-cognitivist in the realm of ethics. For suppose that a legal realist claimed that policy choices

about the motives of justices. Indeed for the early legal realists to have been as reductive about motives as their progenitors would have called into question their own political aims. For many of the legal realists of the 1920s and 1930s hoped for an active judiciary committed to the furtherance of liberal causes.

Legal realism is thus a domesticated version of the doctrines of Hobbes and Machiavelli. As such, it might seem to be a plausible compromise position, one which recognizes that the Machiavellian cynicism about human motivation is far overdrawn. Such cynicism is, at least to some extent, empirically unrealistic. At the same time, legal realists plausibly recognize the limits of reasoning in legal dispute.

A compromise it is. But to our minds, legal realism is an intellectually rotten compromise. For once one gives up the motivational reductionism of Hobbes and Machiavellian; once one recognizes that policy or moral preferences may play a role in the actions of judges, then the presumption in favor of behavioral legal realism has little to recommend itself. If we allow that judges are motivated by political or moral goals, why should we assume that legal reasoning and principle plays no role in judicial decision making? Why, that is, should the deck be stacked in favor of behavioral legal realism? It would seem that the behavioral dispute between legalism and realism should be an essentially empirical question in which there is no a priori reason to favor one or the other view. This brings us to the second assumption of behavioral realists, their belief that jurisprudential realism is true.

5. How Jurisprudential Realism Supports Behavioral Realism

Even if behavioral realism is not reductionist about motives, it is clearly reductionist about legal reasoning. As we saw above, the jurisprudential realists criticize jurisprudential legalism and holds argues that legal reasoning can rarely if ever provide any real constraint on or guidance for justices trying to determine how to vote on some case. If this is true, then it certainly makes sense to hold that evidence of the consistency of voting on the part of justices shows that their decisions are based on their moral or policy beliefs. For the truth of jurisprudential realism leads to the conclusion that there simply could not be any legal reasoning that constrains the justices. Thus far from being entirely independent of jurisprudential argument, the behavioral claims of realists rests as much on their acceptance of jurisprudential legal realism as on empirical evidence. As can be seen in the quotations at the beginning of the paper, behavioral realists often use jurisprudential arguments to support their behavioral claims. This, we would suggest, is somewhat shaky ground. For formalism and realism no longer exhaust the range of jurisprudential doctrines.

On the view we find most plausible, legal reasoning is a kind of interpretation in which a justice tries to apply to the case at hand legal principles which makes the best sense out of the principles,

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rather legal reasoning on the basis of principle and precedent shapes the decisions of judges *and* that these policy decisions are determined by both moral reasoning and policy analysis. Such a legal realist could claim to have won the battle about judicial decisionmaking. But he would have lost the war in the larger dispute about whether we can understand the actions of human beings in reductionist terms. He would, in essence, have accepted the traditionalist claim that we can sometimes understand the actions and decisions of others by understanding their moral or principled reasons for action. The fundamental dispute hinges on whether motives of human action are essentially cognitive phenomena which must be understood as such. The reductive approach, which characteristically draws a rigid line between the attitudinal and the cognitive, denies that human motives are essentially cognitive or rational phenomena.

This is not the place to discuss the role of reason in moral argument. Note, however, that an account of moral reasoning can be given which parallels the interpretavist account of legal reasoning we sketch in section five below. For such an argument, see Lovibond (1983) and Walzer (1987)

Constitutional provisions and statutes as well as the judicial decisions of the past.[10] Like all interpretation, this process does not provide fixed answers or an unchanging framework within which the working justice can decide particular cases. Nor is legal interpretation univocal. Different justices can put forward different plausible interpretations of the legal materials on which they draw.

Jurisprudential interpretavism is a position between that of formalists and realists. Like legal realists, interpretavists criticize the formalist claim that legal reasoning, properly done, determines the one best course of action in every case. They argue, however, that the choice is not between legal reasoning that has a fixed, formulaic quality and no legal reasoning at all. For, like the formalists, they insist that legal reasoning is shaped and constrained by the principles, Constitutional provisions, statutes, and judicial decisions of the past.

Interpretavism, as we have described it, is likely to be attacked by defenders of both jurisprudential and behavioral realism on more or less the same grounds that they have attacked formalism. The realists will argue that to admit that interpretation is not univocal and that different interpreters can come to different interpretations of legal material, is to show that legal reasoning cannot constrain judicial decision-making. And, for the realists, this is to show that there must be some other factors besides legal reasoning that lead judges to decide as they do.

This is, on the surface, a powerful and compelling argument. But it is deeply mistaken. For it rests not just on a misguided jurisprudence but on the acceptance of a once popular but now wholly discredited epistemology. The realist position assumes that reason can be said to guide human decisions or beliefs only if there is some algorithmic procedure that tells us what is the reasonable or correct decision or belief in any case. That is to say that reasoning must be guided by fixed criteria that give us clear, univocal, and unambiguous results to deserve the name.

This broad epistemological position, which contemporary philosophers often call foundationalism or epistemology as framework, is central to the legal formalist claim that there is a method that enables lawyers to reach agreement about how to read Constitutional provisions or statutes.[11] And it is found in the efforts of logical positivists and empiricists to portray scientific reasoning as following fully explicit criteria which give definitive answers to scientific disputes. In the last thirty years, however, most philosophers—with a degree of unanimity almost never seen in the field—have utterly rejected this whole conception of knowledge. Led by Kuhn (1962) Quine (1969) Putnam (1981) and, more recently, Rorty (1979, 1982) most Anglo-American philosophers have concluded that, outside of mathematics, there are no methods or criteria that can always give us clear and undisputed answers to the most difficult questions in any field.

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[10] Our sketch is based largely on Dworkin (1986). Others who have presented legal philosophies that are more or less interpretavist in nature include Posner (1988); Ely (1980); Levinson (1982); Bork (1971) and many others. Interpretavism is a broad conception of how legal reasoning should be conducted. As Dworkin has pointed out, legal philosophers who take a broadly interpretavist stance differ about both what is the proper aim or method of legal interpretation in general and what considerations should guide particular aspects of legal interpretation. Thus, many have criticized Dworkin's emphasis on the role of political philosophy in legal interpretation. Dworkin's view of how best to interpret the common law differs radically form Posner's. And his understanding of how to interpret Constitutional law differs radically from Bork's. Yet all three have presented accounts legal decision making that are interpretative in nature. Thus, one should note that by interpretavism, we *do not* mean the doctrine that holds that Justices should be guided by original intent. The doctrine of original intent can be understood as one proposal about the best way in which legal materials should be interpreted. It is not the only one. Nor is it necessarily the best.

[11] We prefer the term "epistemology as framework" because foundationalism is only one type of epistemology that holds that rationality consists in the use of more or less algorithmic decision procedures. Some versions of coherentism also exemplify the notion of epistemology as framework.

The initial reaction to these philosophical critics of epistemology as framework was to accuse them of being relativists who deny that rational dispute is possible at all, in science or anywhere else.[12] But, after a time, it became evident that the new philosophical trend—which is probably best labeled pragmatism—did not reject reasoning and rationality but only a narrow and implausible account of them. Pragmatists argue that there is always an element of human judgment and practical knowledge in the most theoretical of disputes. There are rarely any arguments or pieces of evidence that, by themselves, can eliminate one view or another. That is not to say that it is impossible to reject a particular view of some phenomena. Many theories, explanations, conceptions or views can be rejected on the ground that the preponderance of reasoning and evidence tell against them. Even here, however, our conclusions are not the result of algorithmic decision procedures. They are still the result of judgments that, in these cases at least, are easy. In many cases however, there are no easy judgments. Different people will come, with good reason, to different conclusions. Over time, innovation, further analysis and new evidence will perhaps make some of these cases easy as well. But there is no reasons to think that all rational disputes in all fields can be settled by easy judgments, that is, judgments that are essentially non-controversial among those with the training and experience to make them.

The perceptive reader will have noticed how, in the last paragraph, we gradually slid more and more judicial terminology into our account of pragmatism. In doing so, we were being true to the view of pragmatists who have frequently held up judicial reasoning as a good model for all rational pursuits (Rorty 1979, ch. 7; Bernstein 1983). Contemporary adherence to jurisprudential realism is thus terribly ironic. Many philosophers have come to reflect on and admire the rationality of legal reasoning. They have recognized that just as sound reasoning can lead scientists to contrary views at the frontiers of knowledge, different interpretations of legal materials can lead judges to contrary views in hard cases. And they have seen that these differences usually rest on a broad base of rational agreement about scientific principles and evidence on the one hand and constitutional and statutory interpretations and precedents on the other. Disagreement on the frontiers of science coexists with broad agreement about what is taught in the introductory courses. And disagreement on the frontiers of constitutional interpretation coexists with broad agreement on what is and is not constitutional. For the vast majority of court cases in which constitutional matters are raised do not lead to disputes that continue to the Supreme Court. In both science and legal reasoning, disagreement at the margins goes hand in hand with a broad consensus. From the standpoint of epistemology as framework any disagreement calls the rational status of a field of inquiry into question. But that theory of knowledge is, I have suggested, largely discredited. Yet, at the same time pragmatic philosophers were rejecting the notion of epistemology as framework, behavioral realists were reviving the arguments that evaluate legal reasoning on the basis of this out of date epistemology.

Of course, we have not and cannot in this space make the case against epistemology as framework and for a pragmatic account of rationality here.[13] Although we recognize that our account of

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[12] This is the way Kuhn's work was taken at first. And Rorty has been accused of relativism as well. For a good correction of this interpretation see Bernstein (1983). For Rorty's denial that he is a relativist, see Rorty (1982).

[13] If you have doubts about this argument, however, consider the case of political science. There are many things upon which students of American politics agree. But there are also central questions where we can find the experts in a great deal of disagreement. Are the political scientists who hold different views in disputes about, say, the rise of issue voting in American politics, or about the reasons that incumbents win in Congressional elections, or, for that matter, about the role of legal materials in Supreme Court decision-making, essentially coming to their conclusions on non-rational grounds? If so, they certainly go to a lot of trouble in trying to collect new pieces of evidence and in making sound theoretical analyses. These are some of the hard cases for political science. That there are disagreements and no fixed criteria for resolving them; that these disagreements involve different judgments about or interpretations of the evidence does not, to our mind, make

interpretavism is merely a sketch, we simply want to remind the reader that many contemporary legal philosophers are interpretavists. Indeed, there are interpretavists on both the left and right. They reject jurisprudential realism and hold that legal principles and precedents can (and should) play a role in judicial decision-making. If jurisprudential realism is as doubtful as we think it is, then jurisprudential realism cannot be taken to support behavioral realism. Or, to put it in other terms, there are no jurisprudential grounds justifying the presumption among behavioral political scientists that behavioral realism is true or that behavioral legalism is guilty until proven innocent.

Of course, the very possibility that legal reasoning *can* constrain the decisions of justices does not show that it *does* so. We do not want to argue that because jurisprudential interpretavism is true, behavioral legalism is true. Rather, we want to insist that whether justices decide on the basis of legal principles and precedents or not is an empirical question, to be decided by an analysis of the best tests of these hypotheses that political scientists can devise. One of the advantages of adopting jurisprudential interpretavism, we think, is that it allows us to make a fair test of the realist and legalist hypotheses about the sources of the decisions of Supreme Court Justices.

There is an interesting objection which behavioral realists could make to our endorsement of jurisprudential interpretavism, one want to take up now. We noted above that, for the interpretavist, different plausible interpretations of the same body of doctrine and precedent can be put forward. Now some interpretavists, such as Ronald Dworkin, argue that in hard cases our interpretation of a body of law will and should be influenced by our policy goals or broader political philosophy (1986). The role of political philosophy here would seem to provide an opening for the behavioral legal realist who asserts that it is political principle and policy goals rather than legal reasoning that determines the decisions of justices.

Such an argument might well be plausible in some cases. But, for three reasons, it would not necessarily undermine the case for the legalist explanations of other judicial behavior. First, once a justice had come to some interpretation of a body of law, we would expect that he or she would continue to apply that interpretation to a range of subsequent cases. Given all we know about the implications of limited time, energy and intellectual capacity on human decision-making, this seems to be an eminently sensible procedure. We frequently use decision rules, standard operating procedures, rules of thumb and the like to reduce the difficulties of decision-making. It is far easier for a justice to consistently apply the same interpretation of a body of law to a range of similar cases than for him to begin with his first political principles or his policy goals and reinterpret the entire range of relevant legal materials each time a new case comes down the pike.

Second, and more importantly, we would argue that although political principles and policy goals are important to the decisions of justices, very often they do not work alone. Interpretavism recognizes the importance of broad political principles and goals in the interpretation of the Constitution, statutes, and precedents. But it holds that these principles and goals can, and most often should, be expressed in a indirect rather than direct manner. Justices should not, and quite often do not, simply follow their own political philosophy when deciding cases. For justices often think themselves obliged to respect the legal materials–the constitution, statutes, precedents and previous interpretations of them–at hand. The respect shown this material constrains the decisions of justices. Although their political principle and policy goals shape their reinterpretation of constitution, statue and precedent, justices attentive to the demands of the legal materials before them cannot reasonably give them any form they desire. Of course, there is dispute about just how much justices should be constrained by

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them arational let alone irrational in nature. If we acknowledge the rationality of contending views in political science, how can we deny the rationality of contending views of the Constitution?

legal material and how much they should be guided by their own political philosophy. Jurisprudential interpretavists disagree about this question. So it may well be that some, or many, justices, decide cases on the basis of their political philosophy alone and then look around for plausible legal arguments to justify their decision. Once again, this is an empirical question. All we mean to say here is that the important role of political principle and policy beliefs in shaping the interpretation of the legal materials does not necessarily lead us to the conclusion that political beliefs are everything and legal materials nothing.

Third, we believe that it often makes no sense to distinguish between political principle or policy goals on the one hand, and interpretations of legal precedent on the other, in the way proposed by behavioral realists. For the political principles and policy goals of justices are often defined and understood in essentially legal terms.[14]

Can we specify the nature of a justice's commitment to a certain conception of the proper range of freedom of speech entirely independent of her understanding of the best interpretation of the First Amendment? Of course, a moral philosopher in some distant time or place could support moral arguments for freedom of speech without any knowledge of or preferences with regard to different interpretations of the First Amendment. But is it likely that an American justice, trained in one of our colleges and law schools, would first come to have moral or policy preferences with regard to civil liberties and then use these independent policy preferences as the basis for an interpretation of the First Amendment?

An American justice confronted with a difficult case in First Amendment law might well see that two different interpretations of previous precedent are possible. Her decision and her choice of how to interpret the First Amendment will then not be dictated solely by previous precedent and principle. Rather, it will determined by her explicit or implicit evaluation of which of the competing values embodied in First Amendment law and in moral arguments about freedom of speech are more important. In cases like this, it is highly likely that constitutional argument, on the one hand, and moral or policy argument, on the other, will be so intertwined that it makes little sense to say that one determines the other.

The notion that one can always find political principles or policy goals that are independent of legal (or legal cum moral claims) is another instance in which a philosophical predilection for reductionism about motives leads us astray. Such reductionism may make sense when one is looking for the self-interested motives that underlie the actions of politicians. For here we can more or less specify such aims as power, prestige, and money independently of understanding a person's moral, public policy, or legal commitments.[15] But, as we have seen, legal realism, in both its behavioral and jurisprudential forms, has never been committed to reductionism about motives. It accepts that justices

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[14] Our argument parallels John Brigham's that it is not narrow legal rules that "constitute the greatest limitation on judicial action" but, rather, "conceptual structures" associated with constitutional language (1978). Our claim is that, for many issues, constitutional questions, on the one hand, and policy and moral issues, on the other, are embedded in the very same conceptual structures.

Although we agree with Brigham's general claim, we would also note that, at a more general and abstract level, the distinction between rules and conceptual structures tends to evaporate. Thus we do not think that Brigham's work can be taken to denigrate the importance of legal principle or precedent in judicial decisionmaking.

[15] Though we can't go into this here in any detail, we should note that it is often not possible to understand the implications of certain social positions or offices for a person's power, prestige and money independently of an understanding of the social meanings embodied in a particular culture. When we explain the actions of men and women in Western cultures, whose ideas about these things we largely share, this is not a problem. In cross-cultural work, it can be a very great problem.

can be motivated by political principles and policy goals. Our basic point, then, is that without a commitment to reductionism about motives, reductionism about legal reasoning can not be sustained a priori.

We have argued that there is no reason to be suspicious of explanations of judicial behavior which suppose that precedent and legal principle are central to the explanation of judicial decision-making. It is still possible, however, that realism is a better behavioral account of the activities of justices than a point of view that pays close attention to their legal reasoning. That, of course, is an empirical question.

How are such empirical questions settled? This is not the place to make detailed recommendations about research methods. But, we can make some general remarks about how to approach such empirical questions. The best tack is to look for consistency in a justice's behavior and her justifications of it, over time. If we find that a justice's decisions in a range of cases can be coherently seen as following from some legal principles or precedents, there is no reason to reject this as an explanation of her actions. If a justice's decisions cannot be seen to more or less consistently follow from certain legal principles or precedents, we will begin to look for other explanations. Suppose her justification of these decisions tend to advance different and conflicting claims at different times, depending upon the nature of the litigants in the case and the litigants' situation. Then we might find, for example, that the explanation of the judge's decisions that best allows us to see her as acting in a coherent and rational way is that she always (or almost always) pursues certain policy aims. In other cases, there may be no way to prise legal considerations apart from moral ones.[16] In still other cases, we might find other motives at work, such as narrow political[17] or economic self-interest.[18]

We are not claiming that legalism should automatically be preferred to realism. We have three responses to the realist claim that this is where our argument leads. First, we would suggest that, once more evidence is in, it might be possible to distinguish between the two explanations on empirical grounds. Second, where one cannot distinguish between the two explanations in this way, it is likely that this is a case in which, for reasons we have just discussed, it makes little sense to distinguish between policy aims and legal principles. And, finally, if such a distinction could be made here, we would argue that, all other things being equal (and *only* when all other things are equal) the simpler

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[16] In distinguishing between these explanations, detailed analysis of the legal doctrines and precedents invoked in the decisions by the different justices would be useful. If we found that justices offer more or less consistent legal principles and precedents for the patterns of voting discerned with Guttman scaling, the legalist interpretation of their decisions would stand. If not, then the realist position would be supported.

Political scientists who do quantitative research typically are knowledgeable about the question of whether a consistent pattern of justification is offered by justices (or groups of justices) who take a particular stance on the range of cases subject to scaling. For the selection of certain cases to be tested with a scaling procedure presupposes that the researcher has some reason to believe that these cases deal with similar sorts of issues. A similar concern is evident in the fact-pattern studies such as those in (Segal 1984a) and (George and Epstein, 1992). Yet those who study the Court with quantitative means often fail to explicitly acknowledge the importance of this non-quantitative evidence.

We are by no means arguing here for the superiority of traditional as opposed to quantitative analysis of the judiciary. What we are saying is merely that the quantitative scholar must explicitly consider both the pattern of voting *and* the pattern of legal argument. Unless he does so, he will be unable to evaluate the dispute between behavioral realists and their opponents.

[17] For example, in the decision that ended the 2000 Presidential election.

[18] What we are suggesting here is not entirely new. Harold Spaeth used a similar approach when he explored the relevance of judicial restraint.

One should also note that there are other possible outcomes we have not canvassed here. For example, a justice can engage in self-deception. He might try to consistently follow certain legal principles but, unknown to himself, fail to do so at times because of a psychological block of one kind or another.

explanation is the legalist one. For not only do judicial decisions have to be explained, but judicial opinions need explanation as well. It seems to us more complicated to explain the decision in terms of policy preferences and then explain the opinion in other terms, such as a justice's efforts to sway the opinion of the public or other judges. It is far simpler to conclude that the legal rationale advanced by the justice, or implicit in the range of his or her decisions, is the main source of the decision.[19]

The behavioral realist might complain that our account simply turns legal realism on its head and privileges legalist over realist explanations. The realist might argue as follows: Suppose we find that in a particular series of cases, a consistent explanation of a justice's actions can be given in terms of either his policy aims or his understanding of legal principle and precedent. Why should we automatically accept the latter rather than the former explanation?

Beyond the commitment to reductionism and the presupposition that jurisprudential realism is true, there is another jurisprudential assumption that tends to lead behavioral scholars to underestimate the evidence for behavioral realism. However, before we turn to this, we want to consider some empirical evidence in favor of behavioral legalism.

6. EMPIRICAL EVIDENCE FOR BEHAVIORAL LEGALISM: THE FACT-PATTERN STUDIES

If we put aside the prejudice against behavioral legalism that follows from the preference for reductionist explanations and the assumption that jurisprudential realism is true, there is much evidence in favor of behavioral legalism. We cannot present detailed evidence here. But we would like to point to two kinds of evidence which are often misinterpreted or overlooked.

One kind of empirical evidence which supports legalism is the fact-pattern studies. These studies were conducted by a number of students of the Supreme Court over the course of the last twenty years.[20] At this point, we will focus on two studies conducted by Segal (1984a, b).[21] Later in this paper we will also examine a fact-pattern study done by George and Epstein (1992). Segal's study is considered by many to be the most important recent fact-pattern study. It is particularly interesting to examine Segal's research because, as the introduction to this article indicates, Segal is one of the judicial behavior scholars who now champions behavioral realism.

In his initial study, Segal proposed a model to predict the search and seizure decisions of the Supreme Court from 1962 to 1981. He examined the Fourth Amendment to the United States Constitution and the Court's search and seizure decisions and posited 18 independent variables which he believed were related to the Court's decisions in this issue area. Some of these variables are factual (e.g., Did the search or seizure take place in the "home", "business", "car" of the defendant or "on his person...in public"?), although in certain situations it may be a matter of legal dispute as to what constitutes a "home", "business", "person" or "in public" (e.g., Is a "motor home" a "home" or a "car"?). Other variables posited by Segal are clearly legal (e.g., "Was the search statutorily allowed

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[19] Of course, this does not mean that other considerations, such as the ones just mentioned, do not come into play when the justice writes an opinion. Again, that is an empirical question.

[20] For an excellent discussion of these studies, see Goldman and Jahnige (1985).

[21] Jeffrey A. Segal, "Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981" and Jeffrey A. Segal "Supreme Court Justices as Decision Makers: An Individual Level Analysis of the Search and Seizure Cases" *The Journal of Politics* 48 (1986):938-955. This work is reviewed and extended in Segal and Spaeth (1993) where Segal's commitment to legal realism is reaffirmed. In this earlier work, however, Segal suggested that his work could be taken to support a legalist view of judicial decisionmaking. The difference between early and later Segal seems to us to rest wholly on jurisprudential rather than empirical considerations.

pursuant to Congress' authority to regulate business?"). Still other variables are a mixture of law and facts (e.g., "Was the search or seizure after hot pursuit"?). Finally, Segal in his "change" variable controlled for the various attitudes of the different justices on the Court during the period under investigation. Segal's dependent variable was: "Did the Court find the search to be reasonable or allow the questionably obtained evidence to be used?" With only two exceptions, Segal's 18 independent variables were found to be statistically significant. His model enabled him to predict 76% of the 123 search or seizure cases decided in the 20-year period of his study.

What does the success of Segal's model suggest? We believe it suggests that personal stare decisis influences decision-making on the Court. Our argument is as follows: The law in search and seizure cases can be defined in terms of the factual and legal conditions under which a search is considered reasonable and under which questionably obtained evidence is allowed to be used. Segal identified a number of these conditions and showed that they are related to the Court's decisions in this issue area. However, the only way they can be related is if a majority of the justices on the Court followed the rule of law announced in the majority opinion in the former cases. Most of this voting is probably based on personal stare decisis, in part, because most of the justices' supported the same outcome under the same conditions as they had in previous cases. In addition, most of the conditions in Segal's model were derived from prior decisions of the court.

The fact pattern model, as its name might suggest, has usually been interpreted by judicial behavior scholars to be a fact model, not a legal model. Gibson and Goldman and Sarat interpret it this way as has Segal in his more recent work, reflecting his conversion to behavioral realism.[22] Yet, as we have argued, we believe that the fact pattern model tested by Segal is a legal model. Segal's model is, of course, not a pure legal model because it contains a "change" variable based on the attitudes of the justices and because it ignores the chronology of the cases. Concerning the latter point, Segal aggregates all the decisions regarding the various conditions, no matter when the first decision regarding each condition occurred. This approach is apparently satisfactory, in part, because in the issue area he investigated the Supreme Court did not hand down any dramatic decisions which might have affected their future decision-making and, in part, because, as George and Epstein point out, often the old doctrine in an area of law anticipates the new one (1992) If Segal, for example, had examined the "right to counsel" cases both before and after *Gideon* (372 U.S. 335 (1963)), he would have had to pay attention to the chronology of the cases. For the "special circumstances" relevant to the Court's decision-making in the pre-Gideon period would be irrelevant in the post-Gideon period. Even though Segal's model is not a pure legal model, it is a model that clearly is dominated by legal variables. Precedents count in Segal's model.

That personal stare decisis influences decision-making on the Supreme Court can be seen even more readily when we turn to the individual level analysis in Segal's second study.[23] Here Segal uses the same search and seizure model presented above (omitting the "change" variable, of course, because it controls for the individual justices) and investigates the behavior of the Court's center justices:

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[22] James L. Gibson interprets it in this way in (1983, p. 13; 1991 pp. 11 and 260-261) as does Goldman and Sarat (1989) pp., 343-345 and Segal himself in (1984b). The view expressed in the later article reflects Segal's conversion to behavioral realism.

[23] Segal, "Supreme Court Justices as Decision Makers: An Individual Level Analysis of the Search and Seizure Cases."

White, Stewart, Powell, and Stevens. Segal was able to explain a large part of their voting based on the independent variables in his model.[24]

Thus Segal's work suggests that personal stare decisis may account for some of the decisions of the justices. Of course, regarding most decisions of the Supreme Court it cannot be expected that justices who dissented in case 1 will conform to the majority in case 2.[25] There are decisions of the Court, however, that have so changed the American society or have so changed American constitutional law, that any justice on the Court, or at least any new justice, no matter what his policy preferences or role perceptions, would feel compelled to follow. We call these decisions "firmly based precedents."

7. EMPIRICAL EVIDENCE FOR BEHAVIORAL LEGALISM: FIRMLY BASED PRECEDENTS

A good example of a firmly based precedent is *Brown v. Board of Education* (347 U.S. 483 (1954)). When Chief Justice Rehnquist was a law clerk to Justice Jackson he wrote a memo to his boss in favor of *Plessy v. Ferguson* (163 U.S. 537 (1896)) which upheld the constitutionality of a Louisiana statute that required trains to provide "separate but equal" cars for black and white passengers. Although Rehnquist later denied that this memo represented his views, there is no evidence, aside from his statement, that this is true (Kluger, 1975; Schwarts, 1989). But Chief Justice Rehnquist, no matter what his views then or now, would not vote to overrule *Brown*. Even former Judge Bork supports *Brown*, while pointing out that the drafters of the Fourteenth Amendment did not intend that this amendment should be interpreted to prohibit racial segregation in the public schools (1990). For *Brown* cannot be changed without drastically changing American society.

Brown is not the only example of a firmly based precedent. Monagham tells us that the *Second Legal Tender Case*, which upheld the constitutionality of Congress' power to make paper money legal tender for the payment of debts, and the series of cases that upheld Congress' power to enact the New Deal legislation and to create the administrative state, are unlikely to be overruled (1988). Regarding the *Second Legal Tender Case* 12 Wallace 457 (1871), for example, Robert Bork states that "if a judge today were to decide that paper money is unconstitutional, I would think he ought to be accompanied not by a law clerk but by a guardian (1990)." This is true even though Bork notes that this decision is contrary to original intent.

One might easily add to the list *Marbury v. Madison* (1 Cranch 137 (1803)); *Martin v. Hunter's Lessee* (1 Wheaton 304 (1816)); the interpretation of the "necessary and proper" clause in *McCulloch*

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[24] Glendon Schubert, *Judicial Behavior: A Reader in Theory and Research,* p. 455 states that personal stare decisis is "but a lawyer's way of talking about what a social psychologists would call the consistency of highly structured attitudes." We agree, of course, that personal stare decisis assumes the "consistency of highly structured attitudes." But, as we have argued before, it makes a difference whether one argues, as does Schubert, that the justice's decision in both case 1 and case 2 was based on consistent attitudes or that the justice in case 2 was influenced by the decision he arrived at in case 1. The latter, it appears to us, is more consistent with what we know of human behavior. We do not rethink every decision anew, testing it against our attitudes. Rather we pay attention to decision we have made in the past and follow and build on them.

[25] Sometimes this does occur, however. Justice Tom Clark claimed that he behaved in this way whenever there was no majority on the Court to overturn a "wrongly" decided case (Dorin, 1978, pp. 271-277; Schubert, 1976) . And Harlan, in *Orozco v. Texas* (394 U.S. 324 at 327 (1969)), claimed that he was following *Miranda* even though he disagreed with it and had dissented in *Miranda*. Whether a justice in case 2 who was not a member of the Court in case 1 or was on the Court, but did not participate in that case, would be influenced by the rule of law presented in the majority opinion in case 1 depends on a number of variables including, perhaps, his moral or policy preferences, his interpretation of the Constitution, the strength of the precedent in case 1, and his willingness to follow precedents of the Court.

v. Maryland (4 Wheaton 316 (1819)); the interpretation of the "commerce clause" in *Gibbons v. Ogden* (9 Wheaton 1(1824)); *Barron v. Baltimore* (7 Peters 243 (1833)); *Cooley v. Board of Warden's* (12 Howard 299 (1952)); the series of decisions that incorporated most of the provisions of the Bill of Rights into the due process clause of the Fourteenth Amendment; *Baker v. Carr* 369 U.S. 186 (1962); and perhaps *Gideon v. Wainwright* 372 U.S. 335 (1963).Yet, almost all these decisions were highly controversial when they were first decided.

It might be argued that the issue in *Brown* (and in these other cases) will never be raised again before the Court and, therefore, will not influence their decision-making. But this is not true. In at least four decisions after *Brown—Mayor of Baltimore vs Dawson* (350 U.S. 877 (1955)); *Holmes v. Atlanta* (350 U.S. 879 (1955)), *New Orleans City Park Improvement Association v. Defieqe* (358 U.S. 54 (1958)) and *Johnson v. Virginia* (373 U.S. 61 (1963))—the Court followed *Brown* and rejected the segregated practice. Whether *Brown* will be followed in this way in the future is difficult to determine. In any event, any justice, if he so wishes, is free to argue in any case that may be relevant to the issue, that *Brown* was wrongly decided. That it is unthinkable that any justice would advance this argument suggests that *Brown* structures decision-making on the Court, by imposing outer limits which the Court will not violate. The other firmly based precedents do the same.

Which cases fall into the category of "firmly based precedents" and which do not is often a matter of interpretation. Indeed, it is more realistic to think in terms of a continuum than in terms of two kinds of cases. And whether a case is at one point of the continuum ("firmly based", for example) or at another may change from time to time. *Plessy*, after all, might once have been classified as a "firmly based precedent". Nevertheless, it is difficult to deny that at any time in Supreme Court history, except for the very earliest period, there were firmly based precedents that the justices felt compelled to follow.[26]

Firmly based precedents are examples of the kind of rational agreement we mentioned in section 4. They are firmly based not because there is a legal method that can lead the justices only to a decision that supports them. Rather, they are supported because it is widely, and with good reason, believed that, given both the legal materials and the history and role of the Supreme Court, there is only one good interpretation of the Constitution on these matters today.

Moreover, firmly based precedents are only one piece of evidence of the broad legal agreement found in American jurisprudence. Realists have sometimes pointed to the ability of appellate judges to control judicial outcomes through control of their dockets. But, as Segal and Spaeth point out, control over appellate dockets is essentially a means of weeding out "frivolous cases (1993, p. 33)." But what makes a case frivolous? If jurisprudential realism were true, a frivolous case would be one in which none of the judges had any policy axes to grind or had no hopes of successfully pursuing their own agenda. This is, in part, a plausible explanation. But it is doubtful that it is the whole story. For what makes many cases frivolous is that, just as with firmly based precedents, the consensus about the interpretation of the legal materials (and the facts of the case) is so solid that there is no room for judicial controversy, whatever the policy or moral views of the judges in question.

The phenomena of firmly based precedents strongly suggests that legal reasoning, and in particular, stare decisis plays an important role in judicial decision-making. Why has such evidence been overlooked in the past? For the same reasons, we think, that scholars have interpreted the fact-

[26] Despite their rejection of legalism, even Segal and Spaeth (1993, pp. 360-361) implicitly accept that there are what we call firmly based precedents. However, they do not recognize the importance of this phenomenon for the dispute between legalism and realism.

pattern studies as supportive of behavioral realism. If the only model we have of legal reasoning—formalism—holds that such reasoning always leads to one correct decision, then the existence of conflict and controversy about difficult cases is proof that jurisprudential legalism is false. And then, it is an easy step to argue that behavioral legalism must be false as well. If we insist on reductionist models of explanation, we will automatically assume that the existence of a broad consensus is to be explained by policy agreement. If, however, we are jurisprudential interpretavists, then the pattern of broad consensus and rather narrower disagreement over difficult cases that we find in Supreme Court decision-making is just what we would expect to find. Jurisprudential interpretavism suggests that legal reasoning plays an important role in both the easy and the hard cases. And it reminds us that if we want to properly evaluate the nature of Supreme Court decision-making, we should not overlook the easy cases—those settled by firmly based precedents or those deemed too frivolous to hear.

8. How Jurisprudential Formalism Supports Behavioral Realism

The evidence we have just canvassed suggests that there are at least some circumstances in which traditional and personal stare decisis influence the decisions of justices. But, as we suggested at the beginning of the paper, following precedent is not the only way in which legal reasoning can influence judicial decision-making. In this section, we want to argue that these other forms of legal reasoning are often overlooked by behavioral scholars. Even the scholars who are supportive of behavioral legalism typically work with an overly narrow view of legal reasoning. As a result, their empirical studies tend to understate the importance of legal reasoning in judicial decision-making.

We said above that legal formalism as a jurisprudential doctrine is all but dead. However, among political scientists who study judicial behavior, formalism seems to be living an eerie kind of afterlife. For when one examines the research of political scientists favorable to empirical legalism, one cannot help but conclude that the jurisprudential stance underlying their empirical work is rather formalist in nature. Indeed, this should not be surprising. If the only alternate jurisprudential model to realism is formalism, and if jurisprudential realism undermines behavioral legalism, we would expect judicial scholars who support behavioral legalism to think that when legal reasoning influences justices, it does so in a formalist manner. To see that this is what they have done, we want to consider one of the very best works which argue for the importance of legal principle and precedent in judicial decision-making, an important article by Tracey E. George and Lee Epstein (1992).

The distinctive feature of the work of George and Epstein is that they test two competing models of Supreme Court decision-making in the area of capital punishment. Each of their models is used to predict 64 Supreme Court decisions to affirm or reject the imposition of the death penalty.

Their first model, which they call a legal model, is influenced by the work of Segal (1984a).[27] To construct this model, George and Epstein examined Supreme Court doctrine with regard to the decision to impose the death penalty. Each of their independent variables operationally defines a rule or principle that the Court has said will guide its decisions about whether the death penalty has been justly imposed in a particular case. As the Court has held that the death penalty may only be applied to those convicted of intentional murder, one independent variable codes the crime for which the defendant has been as "one for which a sentence of capital punishment was proportional to the offense or not (1992, p. 11)." A second principle announced by the Court is that juries which are asked to impose the death

[27] Like us, and unlike most other scholars of judicial behavior, George and Epstein argue that this work should be seen to support behavioral legalism.

penalty cannot be death qualified. That is, those who are generally opposed to the death penalty may not be excluded from such juries. Thus a second independent variable consists of whether the defendants raised the claim that the jury which imposed the death penalty was death qualified. Other independent variables operationally define the principles that juries or judges must not impose the death penalty automatically, arbitrarily or without sufficient attention to the particular circumstances of the crime that favor or disfavor the defendant (p. 12).

George and Epstein also propose what they call an extra-legal model. Here the independent variables attempt to operationally define the policy and moral preferences of the justices, the expertise and "repeat-player status" of the attorneys involved in the cases, and whether the defendant or the state appealed to the Court (pp. 13-14). A final independent variable in the extra-legal model takes account of what George and Epstein call the "political environment." This is meant, it seems, to include both the influence of other branches of government and, indirectly, that of public opinion as well.

George and Epstein find that each of their models do about the same as the other in predicting the decisions of the Court. And prediction is improved when the two models are combined. Thus George and Epstein conclude that both legal and extra-legal factors influence the decision-making of the justices. We agree with this conclusion. However, it seems to us that George and Epstein underestimate the importance of legal factors. That they do so is connected at base to mistaken assumptions about the nature of legal reasoning.

One of George and Epstein's most striking findings is that each of their two models produce different and idiosyncratic errors. The extra-legal model overestimates in a conservative direction, especially for more recent Courts. That is, it often predicts that the Court will approve the imposition of the death penalty where it did not actually do so. The legal model produces errors in the liberal direction for the more recent Courts. That is, it often predicts that the Court will overturn the imposition of the death penalty where it did not actually do so.

The explanation offered by George and Epstein for this interesting phenomena is this: Once the Court had enunciated, in *Gregg v. George* (428 U.S. 153 (1976)) and *Godfrey v. California Godfrey v. California* (446 U.S. 420 (1980)), principles under which they might overturn the imposition of the death penalty, attorneys for defendants began to make arguments which relied on these principles. In the legal model, the existence of such arguments is taken to be a factor which inclines the Court to find for the defendant. Thus, as more such claims come about, the legal model is more likely to predict that the death penalty will be overturned. However, at the same time that more claims of this type were being advanced, the Court was turning in a more conservative direction. The new, conservative justices were much less likely to find for the defendant. Indeed, George and Epstein claim that in at least one case, *Hildwin v. Florida*, "the Court ignored existing precedent and found for the state (p. 19)." Thus George and Epstein claim that in a number of cases where the legal model predicted that the death penalty will be overturned, conservative justices, presumably acting on the basis of their own policy preferences or political pressures, decided to uphold the penalty. Their claim, then, is that the legal model over predicts in a liberal direction because it fails to take into account extra-legal factors.

Similarly, George and Epstein argue that the extra-legal model over predicts in a conservative direction because it fails to take into account legal factors. While conservative justices are inclined to support the death penalty, they cannot or will not do so when the legal precedents and principles enunciated by the Court in previous years clearly lead to the conclusion that the death penalty was wrongly applied in a particular case. Epstein and George point to *McKoy v North Carolina* (110 S.Ct. 1227 (1989)) as an case in which liberal legal precedents forced a conservative Court to overturn the death penalty.

George and Epstein thus claim that in the earlier years they studied, Supreme Court justices were acting on the basis of legal principle and precedent while in later years extra-legal factors began to become more important.

For all its initial plausibility, we find George and Epstein's argument to be inadequate. For it seems to us that support for their claims are in part an artifact of their methods and in part the result of certain jurisprudential assumptions. We begin with the latter.

Legal formalism held that there was one way to interpret any particular legal principle or precedent. While we do not attribute any detailed jurisprudential presuppositions to George and Epstein, we would suggest that this notion is implicit in their work. For why do Epstein and George claim that, in recent death penalty cases, conservative justices are acting on their own policy goals rather than on the basis of legal reasoning, principle and precedent? Why could we not argue that, in these cases, conservative justices have been guided by a conservative understanding of the legal precedents and principles enunciated in earlier cases? The answer, we think, is that implicit in George and Epstein's argument is the assumption that there is only one legitimate way to interpret the earlier death penalty cases and that this is to do so in a liberal direction. Of course, many political scientists who study the Court are liberals, and are inclined to see the recent history of the Court as dominated by the efforts of conservative justices to carry out a political agenda against previous liberal precedents. A conservative observer of the Court, however, might find this view utterly tendentious. For it arrogates to the liberal justices the role of preserver of precedent and principle and casts the conservative justices as politically inspired. A conservative interpreter of the Court might hold that it is conservative justices who have properly interpreted previous precedent in the death penalty cases. And, even where some particular precedents with regard to the death penalty are partly or wholly overturned, the conservative interpreter of the Court could claim that, in doing so, conservative justices are more faithfully interpreting broader Constitutional principles than their liberal opponents.

Our claim, then, is that implicit in the argument of George and Epstein is the assumption that there is one correct legal way to decide death penalty cases and that this is to do so in a liberal direction. This assumption is embodied in their methods. For their understanding of the implications of legal doctrine is shaped by the decisions announced by the earlier, more liberal Courts they studied and, we would suggest, by liberal interpretations of these decisions. Indeed, the very time period they use shapes their results. For suppose that the period of time under study began in 1921 instead of 1971. A legal model based upon the doctrines in force in 1921 would look very different from that constructed by George and Epstein. From the perspective of such a model, the liberal decisions made in the 1970s would probably be understood to result from extra-legal political factors rather than legal precedent and principle.

If we adopted the more flexible understanding of legal reasoning embodied in interpretavism, we would not assume that there is only one reasonable way to apply the Constitution or statue to a particular case. On such a conception, there would be no reason to automatically attribute liberal decisions about capital punishment in 1971 to 1991 to legal precedent and principle and conservative decisions to extra-legal preferences or political factors. We could just as easily argue that both liberal and conservative justices were acting in accord with their own view of what the Constitution or statute demands. Of course, this argument could also be wrong. For justices are sometimes, or perhaps often, motivated mainly by their own policy or moral aims or by political factors. But that is just to say that whether legalism or realism is the best explanation of a set of judicial decisions is an empirical question. Our argument is not that legalism is always to be preferred to realism. Rather our claim is that because of their implicit jurisprudential assumptions, the work of George and Epstein does not fairly

test the two empirical claims. For the evidence they offer of the impact of policy and moral beliefs on judicial decision-making is systematically ambiguous.

Before turning to a concluding section in which we consider how these two empirical claims are to be tested in light of jurisprudential interpretavism, we want to consider a final point. An observer of the dispute between realists and legalists might suggest that the issue between these two schools is not over the influence of the legal reasoning of justices versus their policy and moral preferences but over the importance of the adherence to precedent versus the policy and moral preferences of justices. We believe that this is an important distinction, one which is often overlooked by scholars on all sides. Indeed, the reason that this distinction is overlooked is precisely that a formalist understanding of legal reasoning is assumed by scholars. For if there is basically only one way to interpret a set of legal precedents and principles, then the central issue between behavioral realists and behavioral legalists is whether justices adhere to or overturn previous principles and precedents. For the formalist, to overturn a precedent is, by definition, to vote on the basis of one's moral or policy aims rather than on the basis of legal reasoning. If principles and precedents can be plausibly interpreted in a variety of ways however, then the matter is much more complicated. Then there is no necessary connection between voting on the basis of legal reasoning and adhering to precedent. A justice may be inclined to overturn one precedent because she thinks that, in doing so, she will be adhering to a better overall interpretation of most of the other previous decisions of the Court. Similarly, there is no reason to assume that disagreements between justices will turn on a conflict between precedent and legal reasoning on the one hand as opposed to policy and moral goals on the other. Two justices might well disagree in a particular case even while both are trying to interpret previous principle and precedent.

Once the distinction is made between voting on the basis of stare decisis on the one hand and voting on the basis of legal reasoning on the other, George and Epstein might claim that all they really mean to test is the importance of precedent in judicial decision-making not the importance of legal reasoning as a whole. That is to say, instead of arguing that conservative justices have been motivated by extra-legal factors rather than by legal reasoning in the recent death penalty cases, they could argue not that these conservative justices have simply decided to disregard certain precedents on the basis of conservative legal reasoning. We would argue, however, that this reinterpretation of George and Epstein's empirical research is still not entirely satisfactory. For, once again, we could plausibly argue that what is at issue between conservative and liberal justices is not stare decisis with regard to the early death penalty cases, but how these cases should themselves be interpreted. This is not to say that the situation could not arise in which one group of justices clearly overturn previous precedent on the basis of new legal reasoning. This has clearly been done, most notably in *Brown vs Board*. All we are claiming is that George and Epstein have not made the case that this is what has happened in the death penalty cases.

Once again, the issue we are focusing on is whether previous tests of behavioral realism and behavioral legalism have been sufficient. To adequately test these claims, scholars will have to pay attention to the different ways in which legal principles and precedents can be legitimately interpreted. And they will have to recognize that following previous precedent is not the only way in which Supreme Court justices can be motivated by legal argument.

CONCLUSION

We have argued that the common preference for behavioral realism over behavioral legalism among students of judicial behavior is the result of a number of questionable assumptions. First, we

claimed that realism is often preferred because it fits with the reductionist temper of modern political and social thought. In response, we suggested that neither behavioral nor jurisprudential realism is consistently reductionist at all and that there is no a priori reason to favor reductionist over non-reductionist explanations. Second, we claimed that the preference for behavioral realism also rest on the assumption that jurisprudential realism is true. In response, we suggested that it is by no means obvious the jurisprudential realism is true and that, at any rate, to assume the truth of jurisprudential realism stands in the way of a fair test of behavioral hypotheses. Third, we claimed that even the best examples of research which defends behavioral legalism may understate the importance of legal reasoning in judicial decision-making. For students of judicial behavior often have a narrow understanding of legal reasoning, one which is akin to formalism.

Our three arguments lead to the conclusion that there is no a priori reason to prefer behavioral realism over behavioral legalism. We certainly do not want to argue the reverse case, that there is an a priori argument in favor of behavioral legalism over behavioral realism. Rather, our claim is that the choice between these two perspectives is one which should be made on mainly empirical grounds. We say mainly rather than entirely, however, because it is also our contention that our jurisprudential understanding of legal reasoning plays a role in shaping our evaluation of the empirical evidence collected by students of judicial behavior. This claim, we know, sounds suspicious to political scientists who have been raised on the fact / value dichotomy. But when one stops to think about the interdependence between jurisprudential and behavioral claims, we hope that our argument will come to seem almost obvious. For, after all, how can we make claims about the importance or unimportance of legal reasoning for judicial decision-making without first having some idea of the nature of such reasoning? A behavioral scholar cannot examine the role of legal reasoning on judicial decision-making without accepting, implicitly or explicitly, a jurisprudential account of such reasoning.

We have argued that the interpretavist account of legal reasoning is the one which behavioral political scientists should adopt. The strongest arguments for interpretavism are those presented by the legal philosophers who argue that interpretavism gives a better overall account of the nature of legal reasoning than formalism or realism. We have not attempted to canvass these arguments here. Instead, we have argued that interpretavism is the jurisprudential stance that behavioral scholars should take because it will better enable us to fairly evaluate the competing claims of behavioral realism and behavioral legalism.[28] Jurisprudential realism and jurisprudential formalism both stand in the way of a clear sighted empirical analysis the role of legal principle and precedent in judicial decision-making. Jurisprudential realism leads us to discount the possibility of legalism in advance of empirical research.

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[28] This claim might sound strange to the behavioral scholar who assumes that the preference for one jurisprudential theory or another should rest solely on philosophical arguments rather than the consequences of that preference for empirical research. Though this is not the place for a detailed argument about the nature of legal philosophy, we would argue that it is a mistake to think that the choice of jurisprudential theories is entirely independent of behavioral considerations. On our view, the link between jurisprudential and behavioral investigations runs in both directions. We have focused in the text on how the choice of a jurisprudential theory influences our behavioral conclusions. But the relationship runs in the other direction as well. Philosophical reflections on the nature of human action and human reason in general play an important role in the defense of one or another jurisprudential theory. However, a jurisprudential theory must also be adequate to our most general conclusions about the behavioral issue of how judges actually make decisions. We think that behavioral research has shown that both legal and extra-legal factors can influence the decisions of judges. The open question, on our view, is the relative importance of these two sorts of factors. A satisfactory jurisprudential theory must allow that both sorts of factors can be important to judicial decisionmaking while setting out a normative view of how and where they each should be important. Moreover, such a theory should leave room for behavioral researchers to discover when each of these two sorts of factors influences judicial decisionmaking. We prefer interpretavism not only for more general philosophical reasons but because it fits well with what we now know about judicial decisionmaking and because it will help us learn more in the future. We have argued that neither realism nor formalism is adequate to this task.

Jurisprudential formalism leads us to hold a narrow view of how legal reasoning can influence judicial decision-making.

Once we put aside the presumption against legal explanations of judicial behavior, there is certainly evidence to suggest that legal precedent influences judicial decision-making. We have presented two different kinds of evidence which suggests that legal reasoning, principle and precedent influences decision-making on the Supreme Court. But we by no means want to argue that behavioral legalism is the best overall account of judicial decision-making. Further empirical research is certainly needed to explore these issues. Our hope is that once the jurisprudential assumptions behind behavioral research are clearly recognized, behavioral political scientists will be able to better test the various explanations of judicial decision-making.

Beyond our discussion of issues in the study of Supreme Court decision-making, our paper makes a larger claim, that normative and empirical issues are sometimes intertwined. Even if one finds our analysis of the dispute between legalists and realists implausible, we think that we have established this larger point. For there is simply no way to challenge our views about the study of Supreme Court decision-making except by addressing the normative questions about legal reasoning we have discussed here. Indeed, we have shown that the interrelationship between normative and empirical matters is recognized by all sides. Implicitly—and sometimes even explicitly—the realists claim that their empirical views are connected to their views of jurisprudence. In that they do not differ from us. So, whatever the status of the debate about judicial decisionmaking, a review of recent research in this sub-field clearly shows how empirical and normative issues are intermeshed. This kind of interdependence between fact and value is not unusual in political science. Comparativists who study, say, the political and social circumstances that lead to stable democracy have to define the nature of the beast they study. Yet, as political theorists have shown, the definition of democracy is anything but simple. So, in their empirical accounts, comparativists can not avoid committing political philosophy. By the same token, students of judicial behavior cannot avoid taking some stance on jurisprudential questions.

How far normative and empirical matters are intertwined is a fascinating question, although one we will have to leave for another time. Our hope is that by bringing this interconnection more into the open, other political scientists will examine their own sub-fields for the phenomena we have pointed to here.

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